SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED JUSTICE OF SUPREME COURT **PART** 5
Justice

Index Number : 100321/2012
RIVERA, RAUL
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 002
LEAVE SERVE LATE NOT. OF CLAIM

CAL # 97

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____ **, were read on this motion to/for** _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 3-21-13
MAR 21 2013

_____, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

1. **CHECK ONE:** ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. **CHECK IF APPROPRIATE:** ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

----------X

In the Matter of the Claim of

RAUL RIVERA,

Petitioner,

-against-

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION and NEW YORK CITY HOUSING AUTHORITY,

Respondents.

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DECISION/ORDER
Index No.: 100321/2012
Seq. No.: 002

PRESENT:
Hon. Kathryn E. Freed
J.S.C.

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR §2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED	1-3
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED	
ANSWERING AFFIDAVITS	
REPLYING AFFIDAVITS	
EXHIBITS	4-7
STIPULATIONS	
OTHER	

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Petitioner moves for an Order granting leave to file a late notice of claim against The New York City Housing Authority, (hereinafter, "NYCHA"), pursuant to General Municipal Law §50(a)(5). In the alternative, petitioner moves for an Order: permitting him to serve an amended notice of claim describing the incident more clearly; take an EBT of a NYCHA representative;

inspect the subject sidewalk; obtain access to all complaints affiliated with the subject sidewalk; and to obtain access to any and all sidewalk maintenance and repair records, including photographs for one year prior to the incident to the date, if any, of repair. NYCHA opposes.

After a review of the papers presented, all relevant statutes and caselaw, the Court denies the motion.

Factual and procedural background:

Petitioner alleges that on May 23,2011,he tripped and fell on a defective public sidewalk/curb in front of the premises located at 875 Irvine Street, Bronx, New York. As a result, pursuant to General Municipal Law§ 50-5, petitioner was required to serve a notice of claim on respondent NYCHA within 90 days after the claim arose, specifically no later than August 21, 2011, which he failed to do. Instead, he served a notice of claim on the City of New York and the New York City Department of Transportation, (hereinafter, "DOT"), on June 28, 2011.

On August 25, 2011, petitioner appeared for a 50-h hearing conducted by the City and the DOT, wherein he testified that he fell on a *sidewalk*. On January 9, 2012, 4½ months after his time to file his claim expired, petitioner, via petition, sought leave to file a late notice of claim on NYCHA, asserting that he actually fell on a sidewalk abutting 1215 Seneca Avenue, Bronx, N.Y. Therefore, petitioner now considered NYCHA to be a proper party because it was responsible for the condition of the sidewalk abutting the premises, which he alleges was in a "state of disrepair."

NYCHA opposed said petition. However, on February 15, 2012, Hon. Barbara Jaffe granted petitioner's motion to withdraw, without prejudice. Consequently, petitioner served the instant motion on June 5, 2012.

Positions of the parties:

Petitioner's attorney seeks to file a late notice of claim because petitioner failed to provide him with the address of where the alleged incident occurred. Counsel also asserts that prior to the filing of the notice of claim, petitioner stated that he fell while attempting to avoid the sidewalk. Counsel opines that petitioner's statement "implied that stepping into the street or on the curb, not the sidewalk, caused the fall. As such, that would be NYCDOT's responsibility, explaining the reason why only NYCDOT only was named as the initial Respondent in its Notice of Claim attached as Exhibit "A." (Fundaro Aff. ¶3).

Counsel also asserts that at the subsequent 50-h hearing,"plaintiff did his best to answer questions as to exactly what caused him to twist his ankle, lose his balance and fall, injuring his left knee, illustrating how even defense counsel had difficulty determining exactly what was the immediately precipitating cause of the twisting and falling." (Fundaro Aff. ¶ 5). Counsel also asserts that at said hearing, petitioner was not presented with photographs, thus, he could not be certain as to the proper address. Counsel further argues that photographs were essential, in that if petitioner twisted his foot on the sidewalk, as opposed to the curb, the accident would be the responsibility of the abutting landowner. However, if he twisted his foot on the curb, as he testified to at the hearing, the accident would be the responsibility of the NYCDOT. Counsel asserts that this clarification became apparent when a review of the photographs and testimony determined the exact location plaintiff fell. Additionally, counsel maintains that it was only at that time that it was also determined that the notice of claim failed to indicate that petitioner fell partially as a result of the curb and partially as a result of the sidewalk. Therefore, the abutting landowner would also now be an appropriate party to the instant action.

Petitioner argues that his failure to obtain a clear answer at the hearing should rightfully be considered a reasonable and excusable missed detail that would be corrected by an Amended Notice of Claim. He also argues that some of the questions at the hearing were "vague," through no fault of himself or his counsel.

According to NYCHA, pursuant to Public Housing Law§ 157 and General Municipal Law §50-e, petitioner was required to serve a notice of claim within 90 days after the claim arose, or no later than August 21, 2011, which he failed to do. Additionally, on June 28, 2011, petitioner served a late notice of claim on the City of New York and the New York City Department of Transportation. When petitioner appeared for the statutory hearing conducted by the City and the DOT, he testified that he fell on a sidewalk. On January 9, 2012, some four and one half months after the expiration of his time to file said notice of claim, he sought leave to file a late notice of claim on NYCHA. In that motion, petitioner's counsel advised the Court that petitioner fell on a sidewalk abutting 1215 Seneca Avenue, Bronx, New York.

Petitioner' counsel also attempted to explain the delay in timely serving the notice of claim on NYCHA by claiming that he just realized that petitioner actually fell on the sidewalk in front of 1215 Seneca Avenue, and not just the curb. Therefore, the abutting landowner needed to be served with a notice of claim.

NYCHA argues that petitioner has failed to provide a reasonable excuse for his delay, in that the fact that he fell on the sidewalk was known to his attorney as early as June 28, 2011, within 90 days of his alleged incident. Additionally, NYCHA asserts that a representative of petitioner's attorney took several color digital photographs depicting the exact location of the accident prior to the hearing (Fundaro Aff., Ex. B, pp 40-41). Therefore, not only did petitioner's attorney know the

exact location, he knew or at least should have known the street address of the building abutting the alleged defective sidewalk. NYCHA additionally argues that even if petitioner's alleged fall on the sidewalk had not been discovered until his August 25, 2011 hearing, no excuse was proffered for his additional six month delay in filing the January 9, 2012 motion.

NYCHA also argues that petitioner failed to demonstrate that it acquired actual knowledge of the essential facts constituting the claim within 90 days of the alleged incident or a reasonable time thereafter. It asserts that petitioner made absolutely no attempt to ascertain if NYCHA was aware of his claim. In support of its contention, NYCHA refers to and relies on the affidavit of Lourdes Wright, annexed to its motion as Exhibit "D." Ms. Wright is employed by Building Management Associates Inc., a private management company hired by NYCHA to manage and maintain the premises known as 875 Irvine Street, Bronx, New York. In her affidavit, Ms. Wright avers that she conducted a search of records affiliated with 875 Irvine Street, and did not find any accident report or record referring to the subject incident.

NYCHA also argues that petitioner has failed to demonstrate that his delay did not cause it to incur any prejudice. It argues that a delay of over a year severely impeded its ability to investigate the alleged defect, identify witnesses and collect testimony based upon fresh memories. It also argues that petitioner's application for pre-trial discovery should also be denied because petitioner requests it merely "to show that Defendant NYCHA knew about this serious defect of a cracked sidewalk prior to and after the fall in this case" (Fundaro Aff. ¶8). NYCHA argues that whether or not it was aware that a defective condition existed prior to petitioner's alleged incident is irrelevant.

Conclusions of law:

In determining whether to grant leave to serve a late notice of claim, the Court must consider

specific criteria in its exercise of discretion: (1) an explanation for the delay in filing a timely Notice of Claim; (2) whether the municipality acquired actual knowledge of the essential facts constituting the claim within ninety days or within a reasonable time thereafter; and (3) whether the late filing has substantially prejudiced the entity's ability to investigate and defend against the claim (*see* Education Law§ 3813[2-a]; General Municipal Law§ 50-2[5]; Williams v. Nassau County Med. Ctr., 6 N.Y.3d 531,535[2006];Bazile v.City of New York,94A.D.3d929,929-930[2dDept. 2012];Goldstein v. Clarkstown Cent. School Dist., 208 A.D.2d 537 [2d Dept. 1994], *lv. denied* 85 N.Y.2d 810 [1995]; Plaza v. New York Health & Hospitals Corp.(Jacobi Medical Center), 97 A.D.3d 466 [1st Dept. 2012]; Seif v. City of New York, 218 A.D.2d 595 [1st Dept. 1995]).

With respect to the first criterion, the Court finds that plaintiff has failed to provide a reasonable excuse for the delay and has also failed to establish that NYCHA had actual notice of his claim. Indeed, a municipality must have prior knowledge of a potential claim; knowledge of an occurrence or general condition is not sufficient to support a motion to file a late notice of claim (*see* DeVivo v. Town of Carmel, 68 A.D.3d 991 [2d Dept. 2009]). Additionally, the Court notes that petitioner's counsel became aware that petitioner fell on the sidewalk at petitioner's 50-h hearing held on August 25, 2011. Nevertheless, counsel filed his first motion seeking leave to file a late notice of claim based on this allegedly newly discovered information, on January 9, 2012, and the instant motion seeking the same relief on June 5, 2012. Petitioner fails to proffer any reason/excuse for this additional delay.

Petitioner has also failed to satisfy the second criterion. Indeed, he has failed to indicate with any degree of specificity, that NYCHA acquired knowledge of the facts constituting his claim within 90 days or a reasonable time after. Actual knowledge of the essential facts is an important factor in

determining whether to grant an extension and thus, should be accorded great weight (*see* Kaur v. New York City Health & Hosps. Corp., 82 A.D.3d 891 [2d Dept. 2011]). In its determination that petitioner has not satisfied the second criterion, the Court notes that it has accorded the aforementioned affidavit of Ms. Wright, significant weight.

The Court also finds that petitioner has failed to satisfy the third criterion. To enable authorities to investigate, collect evidence and evaluate the merit of a claim, persons seeking to recover in tort against a municipality are required, as a pre-condition to suit, to serve a notice of claim (*see* Winbush v. City of Mount Vernon, 306 N.Y. 327, 333 [1954]; Brown v. City of New York, 95 N.Y.2d 389, 391 [2000]). Here, petitioner has failed to demonstrate that his delay in timely asserting his claim would not substantially prejudice NYCHA in maintaining its defense on the merits (*see* Iacone v. Town of Hempstead, 82 A.D.3d 888 [2d Dept. 2011]; Tegay v. Rock Point School Dist., 101 A.D.3d 985 [2d Dept. 2012]). This certainly lends legitimacy to NYCHA's contention that petitioner's one year delay compromises its ability to investigate his claim thoroughly.

In consideration of this, the Court is also not inclined to entertain petitioner's alternative solution, that he add NYCHA as a respondent via an amended notice of claim, particularly in view of the fact that leave to file an amended notice of claim is permitted where the error in the original notice of claim was made in good faith and where the other party has not been prejudiced thereby (*see* D'Allesandro v. New York City Tr. Auth., 83 N.Y.2d 891, 893 [1994]; Palmieri v. New York City Tr. Auth., 288 A.D.2d 361, 362 [2d Dept. 2001]).

Finally, the Court also rejects petitioner's request for pre-action discovery. Petitioner seeks pre-action discovery "so that plaintiff has an opportunity to show that Defendant NYNCA knew

about this serious defective cracked sidewalk prior to and after the fall in this case."

CPLR§ 3102 [c] provides, in pertinent part, that" "[b]efore an action is commenced, disclosure to aid in bringing an action, to preserve information..., may be obtained, but only by court order." Thus, pre-action disclosure can be used "to enable plaintiff to frame a complaint," "to preserve evidence for a forthcoming lawsuit," and to "ascertain the identities of prospective defendants" (Bumpus v. New York City Transit Authority, 66 A.D.3d 26, 33 [2d Dept. 2009]; *see also* Stewart v. New York City Transit Authority, 112 A.D.2d 939, 940 [2d Dept. 1985]).

However, "pre-action discovery is not permissible as a fishing expedition to ascertain whether a cause of action exists" (Bishop v. Stephenson Commons Assocs.L.P., 74 A.D.3d 640, 641 [1st Dept. 2010], *lv. denied* 16 N.Y.3d 702 [2011], quoting Liberty Imports v. Bourguet, 146 A.D.2d 535, 536 [1st Dept. 1989]); cannot "be used to ascertain whether a prospective plaintiff has a cause of action worth pursuing;" and cannot be used solely "to explore alternative theories of liability" (Uddin v. New York Transit Authority, 27 A.D.3d 265, 266 [1st Dept. 2006];Holtzman v. Manhattan and Bronx Surface Transit Operating Authority, 271 A.D.2d 346, 348 [1st Dept. 2000]).

Furthermore, petitioner must "show the existence of a prima facie cause of action" or "a meritorious cause of action" (Toal v. Staten Island University Hosp., 300 A.D.2d 592, 592 [2d Dept. 2002]; Holtzman v. Manhattan and Bronx Surface Transit Operating Authority, 271 A.D.2d 346, 347 [1st Dept. 2000]). Additionally, petitioner must establish "that the information sought is material and necessary to the actionable wrong" (Holzman, 271 A.D.2d at 347).

In the instant case, the Court finds since petitioner has failed to allege any facts supporting his bare claim that NYCHA was negligent and that its negligence caused his injury, the Court is constrained to deny this application.

Therefore, in accordance with the foregoing, it is hereby

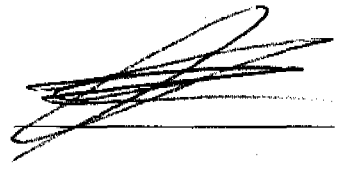
ADJUDGED that the petition for leave to serve a late notice of claim to add NYCHA as a party to the instant action is denied; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141 B) and the Clerk of the Trial Support Office (Room 158), are directed the mark the court's records to reflect the change in the caption herein; and it is further

ORDERED this constitutes the decision and order of the Court.

ENTER:



DATED: March 21 2013

Hon. Kathryn E. Freed

J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT